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ABSTRACT

This chapter reviews court cases and makes recommendations in light of the rising incidence of campus crimes and increased third-party litigation. There is greater awareness of gang and acquaintance rapes and a general increase in rapes, assaults, and murders. To secure compensation, women are also suing the institution on whose campus the assaut occurred. The victim must demonstrate that a "special relationship" existed between her and the third party that entitles protection. In the 1984 "Miller v. State" ruling, previous incidences in the dormitory (scene of the sexual assault) indicated that "a reasonably foreseeable likelihood of criminal intrusion" constituted a breach of university duty. The California Supreme Court stated in 1984 that in exchange for using the facilities, where they spend a significant portion of their time, students should expect safety. Erosion of governmental immunity is an issue. In "Duarte v. State," an appellate court held that the university had no immunity from liability for employees' negligence, which was at stake in a mother's suit for the rape and murder of her daughter while residing in a dormitory. Institutional administrators should be aware of potential assaults, provide adequate security and policies to discourage crime, and respond rapidly to assaults. Recommendations include prevention programs, increased security, and training for officers. (CJH)

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Minimizing Liability for the College Administrator: Female Student Protection

Steve W. Ratson

Although it may not indicate an increasing crime rate, many college campuses are experiencing more frequent reports of campus crime.[1] As a result of the violence and activism of the 1960's and 1970's, many schools revised their disciplinary codes making them more effective and possibly inspiring more reporting of crimes.[2]

One category of crimes reported more frequently in the past few years is sexual assault of female students. Although most experts estimate that forty-seven to ninety percent of all rapes are never reported, the Federal Bureau of Investigation crime report indicated a total of 84,233 rapes for 1984 – a 6.7 percent increase over 1983.[3] Many women fail to report being raped for several reasons, including lack of faith in the police, fear of unsympathetic treatment, embarrassment of publicity, fear of assailant reprisal, and apprehension of further victimizing by the court proceedings.[4]

The most common forms of sexual assault are "acquaintance gang rape"[5] and "date rape."[6] Preliminary results of a three-year study of 6,500 students at thirty-five universities sponsored by Ms. Magazine and conducted by a psychologist from Kent State University indicate that one out of eight women had been raped. Forty-seven percent of those raped said the rapists were either first dates, casual dates, or romantic acquaintances. A 1984 survey of 500 students at Brown University found that sixteen percent of the women had been raped by dates or acquaintances, and eleven percent of the male students surveyed indicated they had forced a women to have intercourse.[7]

According to a new study conducted by the Project on the Status and Education of Women of the Association of American Colleges, gang rapes on college campuses are on the increase with seventy percent

1. Administrator Special Report, Crime on Campus: A National Perspective 1 (1985).
2. *Id.*
3. The Dallas Morning News, Nov. 10, 1985, at 4F, col. 1.
4. Torrio, *Campus Rape: Determining Liability*, 19 Trial 100 (1983).
5. The Chronicle of Higher Education, Oct. 16, 1985, at 35, col. 1.
6. The Dallas Morning News, *supra* note 3, at 4F.
7. *Id.*

occuring at fraternity parties.[8] The study also found that such incidents also occur in residence halls and at off-campus parties with twenty percent involving varsity athletes. From a study of fifty cases, it was shown that the typical victim is a young woman who has had too much alcohol or too many drugs and is assaulted by two or more males.[9] The study found that acquaintance gang rape was a regular occurrence on a few campuses and that all types of colleges and universities, public and private, had experienced this problem.[10]

A third category of assault/rape is committed by the non-student total stranger who wanders onto campus or purposely enters a campus seeking out a victim.

Third Party Liability

Although not a new phenomenon, civil suits against perpetrators of sexual assaults are becoming more commonplace.[11] In an effort to secure compensation for injuries, women are also suing a third party – the college or university on whose campus the assault occurred. To remove the case from the general rule of no liability, the victim must show that a "special relationship" existed between her and the third party that entitles her to demand protection from harm.[12] Theories of third party liability include landlord-tenant [most commonly used in college campus cases], business-patron, innkeeper-guest, common carriers, employer-employee, parent-child, and government-citizen.[13]

As more assault and rape incidences are reported by female students, the more institutions are being held liable for the safety of these students. Although this is still an evolving area of tort law[14], several recent cases given an indication of the emerging institutional responsibilities being defined by the courts.

Foreseeability and Breach of Duty

Miller v. State[15] involved a nineteen year-old junior at SUNY at Stony Brook who was confronted in her dormitory laundry room at 6:00 A.M. one morning by a man with a large butcher knife. Her assailant blindfolded her and led her through two unlocked doors up to a third floor room where she was raped twice and threatened with death. She was

8. The Chronicle of Higher Education, *supra* note 4, at 35.

9. This study will be published in December 1986 as "Campus Gang Rape: Party Games?" by the Project on the Status and Education of Women, Association of American Colleges, 1818 R Street, N.W., Washington, D.C. 20009.

10. The Chronicle of Higher Education, *supra* note 4, at 35.

11. Ballou, *Recourse for Rape Victims: Third Party Liability*, 4 Harv. Women's L.J. 105, 106 (1981).

12. *Id.* at 110.

13. *Id.*

14. NOLPE Notes (Nat'l Org. on Legal Probs. of Educ.), April 1985, at 1.

15. 478 N.Y.S.2d 829 (N.Y. App. Div. 1984).

then led out to the parking lot and abandoned. She sued to recover personal injuries, and the trial court awarded her $25,000 based upon the defendant's negligent failure to provide adequate police protection and a breach of duty to protect its tenants from reasonably foreseeable criminal assaults by outsiders.[16] Several facts stood out in this case. Strangers were not uncommon in the dormitory hallways, and there had been reports to security of men in women's bathrooms. The claimant had complained twice about lounge and hallway loiterers. The student newspaper had reported numerous dormitory crimes, including armed robberies, burglaries, criminal trespass and a rape. Despite these incidences, none of the ten entrance doors to the dormitory were ever locked.

The student appealed on the ground of inadequacy of damages, and the state cross-appealed on the question of liability. The New York Appellate Division, reversed the decision and dismissed the claim, and the student again appealed. The Court of Appeals of New York found sufficient evidence that "the State's failure to lock the outer doors was a breach of the State's duty and a proximate cause of the rape."[17] The case was remitted to the appellate division for determination of facts and issues not reached on appeals. Addressing the role of the state as landlord, the court stated that "a landlord has a duty to maintain minimal security measures, related to a specific building itself, in the face of foreseeable criminal intrusion upon tenants."[18] Does this mean that the court felt that the state should be liable for failure to keep all dormitory doors locked? In a concurring opinion, Justice Kaye stated that "with several thousand students living in 27 dormitories at Stony Brook alone, each dormitory presumably having several entrances, that would be a truly onerous—if not impossible—obligation for any security force, involving the allocation of police resources."[19]

In rendering its decision, the court stated that this type of case must be "carefully scrutinized"[20] to determine where it falls along the continuum spanning the spectrum from a proprietory capacity as a private landlord with a certain duty of care all the way over to a police capacity involving executive decisions regarding allocation of security resources, governmental functions, and subsequent immunity. The court concluded that "ownership and care relating to buildings with tenants has traditionally been carried on through private enterprise, specifically by landlords and thus constitutes a proprietary function when performed by the state."[21]

In the *Miller* case, substantial evidence of previous incidences indicated that there was "a reasonably foreseeable likelihood of criminal

16. *Id.* at 831.
17. *Id.* at 833.
18. *Id.*
19. *Id.* at 834 (Kaye, J., concurring).
20. *Id.* at 832.
21. *Id.* at 833.

intrusion"[22] into the dormitory. In a similar case absent of repeated criminal activity, the court held for the institution. In *Brown v. North Carolina Wesleyan College, Inc.*[23], following a basketball game three cheerleaders were abducted by a lone male and driven to a nearby rock quarry where one of the girls was raped and murdered. The abductor was subsequently tried and convicted of these crimes[24], and the administratrix of her estate brought action against the college alleging negligence. The most serious previous crimes on campus were a business office burglary ten to twelve years ago, a vandalism of vending machines five years ago, and a reported attempted rape two years ago. The campus of 408 students was regularly patrolled by the sheriff's department; had a security staff of three full-time students, two full-time non-students, and a director of security; and had at least one security officer on duty each hour who, among other duties, reported lighting problems, replaced burned out exterior bulbs, and was equipped with a uniform, mobile radio, and security vehicle.

The superior court granted summary judgement in favor of the college, and the administratrix appealed. The Court of Appeals of North Carolina, in affirming the decision of the lower court, stated that "foreseeability of a criminal assault determines a college's duty to safeguard its students from criminal acts of third persons" and "the forecast of evidence does not show a repeated cause of criminal activity which would have imposed a duty upon defendant to keep its campus safe."[25]

Palsgraf Formulation

The admittance of a conditionally released prisoner as a student and the subsequent rape and murder of a female student and the stabbing of her male friend was the subject of a New York case, *Eiseman v. State.*[26] State University College at Buffalo admitted a conditionally released prisoner from Fishkill Correctional Facility as a full-time residential student in a program for educationally disadvantaged known as SEEK (Search for Education, Elevation, and Knowledge). Six months later at an off-campus apartment, he raped and murdered a female student and stabbed her male friend six times. The surviving non-student and the father of the deceased student sued the institution for personal injuries, pain and suffering, and wrongful death asserting that the state was negligent in failing to inquire into the prisoner's background, failing to inform college officials of his history of psychiatric disorders and heroin abuse, releasing him from prison without precautionary conditions, and failing to provide parole supervision.

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22. *Id.* at 829.
23. 309 S.E.2d 701 (N.C. Ct. App. 1983).
24. *See* State v. Smith, 292 S.E.2d 264 (N.C. 1982).
25. Brown v. North Carolina Wesleyan College, Inc., 309 S.E.2d 701, 703 (N.C. Ct. App. 1983).
26. 489 N.Y.S.2d 957 (N.Y. App. Div. 1985).

The student prisoner had a prior arrest record of twenty-five charges including assault, robbery, and drug-related crimes. Following each parole he reverted to heroin abuse [having been a heroin abuser for twenty-six years] using up to twenty-five bags a day. He had been psychiatrically examined five times and had been diagnosed as suffering from "chronic schizophrenia, paranoid type, with impulsive-explosive personality, a high criminal potential, a high mental pathology potential, and a low rehabilitation potential."[27] He had also attempted suicide once while in a maximum security facility.

In applying for the SEEK program, he listed his present and former addresses and the source of a high school equivalency diploma at correctional institutions. His three references resided in towns in which he had never lived. A prison physician, in completing the required health form, responded negatively to any history of emotional instability, failed to indicate long history of heroin abuse, and gave no response to previous psychiatric care. Although he had been admitted for the fall term, he ran into problems with prison authorities and attempted suicide, and his admission was delayed until the winter semester. College officials made no attempt to check into these problems.

The court held that the prison physician's failure to inform the college of a potential danger was negligent and proximately caused the rape and murder of the student; that the physician had no duty to inform college of potential danger to non-student; that the college was negligent in entering the program without establishing rational criteria, and that the murdered student was within the scope of duty assumed by the college. The court stated that "the scope of the College's duty herein is the well-known *Palsgraf* formulation that 'the risk reasonably to be perceived defines the duty to be obeyed.'"[28]

Special Relationship

In *Peterson v. San Francisco Community College District*,[29] an assailant jumped from behind "unreasonably thick and untrimmed foliage and trees"[30], assaulted and attempted to rape a student as she ascended a stairway in the college's parking lot. The student sued the institution for damages under California's Tort Claims Act and the trial court dismissed the case. The plaintiff then appealed to the California Supreme Court with two causes of action: first, that by virtue of a special relationship between the school district and herself, the defendants had a duty to protect her and to warn her of possible danger; second, that defendants are liable for maintaining a dangerous condition of property which, together with the assault, caused her injuries.

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27. *Id.* at 961.
28. *Id.* at 965, *quoting* Palsgraf v. Long Island R. Co., 162 N.E. 99, 104 (N.Y. 1928).
29. 685 P.2d 1193 (Cal. 1984).
30. *Id.* at 1195.

The appellate court reversed the trial court's ruling holding that the community college district had a duty to protect students from reasonably foreseeable assaults, that the district was immune from liability for failure to provide adequate police protection, that the district could be held liable for failing to trim foliage and for failing to warn students of danger, and that the plaintiff had stated a cause of action under the Tort Claims Act provisions.[31] The court stated that:

> In the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime.[32]

The institution was aware of similar crimes in the same location, had not trimmed the foliage to increase visibility, and had not warned the student of the possible danger even though they had issued a parking permit in return for a fee, had invited her onto campus property, and had enrolled her as a student. These actions had established a special relationship between the institution and the student giving rise to a duty to protect her from assault.

Erosion of Governmental Immunity

Ziss v. Cuyahoga County Community College District[33] involved a community college student who was robbed and beaten by an armed assailant while she was walking to the campus library. The student sued the college alleging negligence in failing to maintain adequate security, proximately resulting in her injuries. The trial court granted a motion for summary judgement on the ground of sovereign immunity, and the student appealed. The appellate court, citing several previous cases, held "that defense of sovereign immunity was not available to community college districts in tort action for negligence."[34] The court's reasoning involved the fact that community colleges could purchase liability insurance and that the "archaic public policy... that an individual should suffer an injury rather than a governmental entity be inconvenienced"[35] had been repudiated by previous decisions. The case was remanded for further consideration.

An underlying issue in the appeal of *Cutler v. Board of Regents of State of Florida*[36] was "whether sovereign immunity acts as a bar to recovery for damages sustained by appellant when she was assaulted

31. *Id.* at 1193.
32. *Id.* at 1201.
33. 468 N.E.2d 752 (Ohio Ct. App. 1983).
34. *Id.* at 753.
35. *Id.*
36. 459 So. 2d 413 (Fla. Dist. Ct. App. 1984).

and raped by three armed assailants in her dormitory room on campus of Florida Agricultural and Mechanical University."[37] The student had contracted for living accommodations in the dormitory, and the university had represented this as a safe and secure area despite numerous alleged assaults, attacks, and rapes of FAMU female students.

The initial complaint dismissed by the trial court for failure to state cause of action alleged liability for breach of warranty and habitability, failure to control conduct of third persons, breach of duty to anticipate, misrepresentation, and failure to maintain common areas. The appellate court reversed and remanded holding that the "student was entitled to amend her complaint to include sufficient factual allegations, if possible, which would entitle her to relief under the various causes of action."[38] Among other documents, the appellant failed to attach to her complaint a copy of her rental contract. In remanding the case, the appellate court stated:

> Although Florida recognizes no duty on the landlord's part to protect his tenants against criminal conduct of third persons merely by reason of the landlord-tenant relationship, recent Florida decisions have held that a landlord, who recognizes and assumes the duty to protect his tenants from foreseeable criminal conduct, may be liable if he fails to take reasonable precautions to prevent injury to his tenants from this conduct.[39]

However, the court stated that "it does not appear to be settled in Florida whether liability may be predicted on foreseeability alone ... absent an allegation that the landlord expressly or impliedly assumed such a duty."[40] In addressing the defense of sovereign immunity, the court noted that the duty to warn of a known danger is an "operational-level" function of government [as opposed to a "judgmental, planning-level" function] and not subject to sovereign immunity.[41] The court noted in conclusion "that sovereign immunity is not a bar to an action on the breach of an express, written contract entered into by a state agency under its statutory authority"[42] but failed to extend this reasoning for a breach of an express or implied warranty of habitability.

Another Florida case, *Relyea v. State*[43], involved two female seniors at Florida Atlantic University who were assaulted in the parking lot by three men and then driven to a secluded area and murdered. Parents of both girls sued the state, board of regents, chancellor, and regents' insurance company for negligence. The trial court held for the univer-

37. *Id.* at 414.
38. *Id.* at 413.
39. *Id.* at 415.
40. *Id.*
41. *Id.* at 416.
42. *Id.* at 417.
43. 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980).

sity, the plaintiffs appealed, and the appellate court affirmed the trial court's decision stating that "the allegations of negligence fall within the definition of a discretionary function ... whether to provide security guards, parking attendants, security gates, and the numbers thereof, are clearly discretionary decisions, partially based upon budgetary limitations controlled by the Legislature."[44] The plaintiffs, according to the ruling, had failed to show foreseeability of violent assaults. There had been no serious crimes since the founding of the school in 1963.

A 1985 New Jersey case, *Jansson v. Fairleigh Dickinson University*, involved two female students who were brutally attacked and repeatedly raped in their dormitory. They sued the university alleging negligence and seeking compensatory and punitive damages. The lower court granted defendant's motion to dismiss based on apparent failure of plaintiffs to respond to interrogatories. Actually, their counsel never forwarded their answers to the defense counsel but continued to assure his clients that a trial was imminent. The appellate court remanded the case stating that "the students were not to be penalized for misconduct of their attorney."[46]

Duarte v. State[47] is a California case in which a mother sued for the rape and murder of her daughter while residing in a dormitory on the campus of California State University at San Diego alleging breach of warranty of habitability, negligence, and negligent misrepresentation. There had been a chronic pattern of violent assaults, rapes and attacks on females, and the pattern escalated prior to this rape and murder. The plaintiff alleged that the defendant not only was aware of the increasing pattern of violence but also attempted to keep these facts from the campus community. The trial court held for the state but the appellate court reversed the decision holding that, under the landlord-tenant relationship and traditional tort rules, the university owed a duty of care to provide a safe residence, that negligent misrepresentation as a cause of action was not barred by governmental immunity as neither was action based on landlord-tenant contract or implied contract of habitability, and that the university had no immunity from liability for employees' negligence.[48]

Quoting *Muskopf v. Corning Hospital District*, the court stated that "when there is negligence, the rule is liability, immunity is the exception."[49] The court further commented that "where a dangerous condition exists upon government property, the sovereign immunity defense is not available."[50]

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44. *Id.* at 1382.
45. 486 A.2d 920 (N.J. Super. Ct. App. Div. 1985).
46. *Id.* at 920.
47. 151 Cal. Rptr. 727 (Cal. Ct. App. 1979).
48. *Id.* at 727.
49. 359 P.2d 457, 462 (Cal. 1961).
50. Duarte v. State, 151 Cal. Rptr. 727 (Cal. Ct. App. 1979).

Conclusions

As the incidence of rapes and assaults on college campuses, or at least the incidence of reports, continues to rise, the likelihood of increased third party litigation involving colleges and universities will continue. This is particularly likely with the increased awareness of gang and acqaintance rapes coupled with a general increase in rapes, assaults, and murders.

Institutions need to be fully aware of potential and actual assaults, to provide an adequate level of campus security and comprehensive policies to discourage such activities, and to respond rapidly when assaults do occur. Recommendations include:

1. Strohg and well-publicized policies and judicial procedures to deal with gang and individual rapists;
2. Rape prevention programs targeted to high risk groups;
3. Increased security lighting in problem areas with regular monitoring and maintenance;
4. Scrutiny of landscaping patterns to avoid hiding places near dormitories, parking lots, and remote locations;
5. Review of class scheduling to avoid scattered evening classes in remote buildings;
6. Installation of security telephones at potential trouble spots with direct connection to the security offices;
7. Increased dormitory security, including deadbolt locks;
8. Special rape prevention and sensitivity training for security officers; and
9. Evening escort services provided by security or campus organizations.